SPEECH

OF

THE HON. MR. MERCER,

IN THE HOUSE OF REPRESENTATIVES,

ON THE

SEMINOLE WAR.

HOUSE OF REPRESENTATIVES,
January 25. 1819

In committee of the whole on the state of the Union, (Mr. *Pleasants* in the chair,) the following resolution, reported by the committee on military affairs, together with the amendments proposed thereto, by Mr. *Cobb*, being under consideration, viz.

Resolved, That the House of Representatives of the United States disapproves the proceedings in the trial and execution of Alexander Arbuthnot and Robert C. Ambrister.

The amendments proposed by Mr. *Cobb*, are as follow:

Resolved, That the committee on military affairs be instructed to prepare and report a bill to this House, prohibiting, in time of peace, or in time of war with any Indian tribe or tribes only, the execution of any captive, taken by the army of the United States, without the approbation of such execution by the President.

Resolved, That this House disapproves of the seizure of the posts of St. Marks and Pensacola, and the fortress of Barrancas, contrary to orders, and in violation of the constitution.

Resolved, That the same committee be also instructed to prepare and report a bill prohibiting the march of the army of the United States, or any corps thereof, into any foreign territory, without the previous authorization of Congress, except it be in the case of fresh pursuit of a defeated enemy of the United States, taking refuge within such foreign territory.

After Mr. Sawyer had closed his remarks Mr. MERCER addressed the chair; and, adverting to the late hour of the day, moved that the committee should rise, in order that he might have it in his power to call upon the departments of war and of the navy, by a resolution which he read in his place, for information on a subject intimately connected with the present topic of debate. He had been informed, Mr. M. said, that the combined attack of a military and naval force of the U. States, upon the negro and Indian fort, situated on the Appalachicola river, in East Florida, in the summer of 1816, was made without the authority of the President of the United States. Regarding this as the commencement of the late Seminole war, he deemed it proper to obtain the information which he sought, in as early a stage of the debate as practicable. The committee having, however, refused to rise—Mr. MERCER proceeded, in substance, as follows:

The report of the military committee, Mr. Chairman, coupled with the resolutions submitted by the honorable member from Georgia, (Mr. Cobb) have relieved me from much inquietude. Having, before the report of the select committee was received, denied the authority of congress to punish a military officer, I rejoice that a course has been adopted, which, while it falls strictly within the province of this house, is calculated to heal the recent wounds inflicted on the constitution, and to vindicate the insulted character of the nation.

I would watch, said Mr. M. with equal jealousy, the encroachments of legislative, as of executive power. And, aware that the former is least capable of precise definition, and, therefore, most easily enlarged, could I behold, in the resolutions on your table, an attempt to invade the rights of any of the other departments of the government, they would meet my most decided opposition.

Punishment implies responsibility. The responsibility of every military officer is to the President of the United

States. His responsibility to congress, through the constitutional medium of impeachment, and through that alone.

But the resolutions before us have for their object neither a censure of General Jackson nor of the Executive. Pursuing the natural course of legislation, they ascertain the existence of a public abuse, and recommend the application of a constitutional corrective. They spring from an enquiry into the conduct of the Seminole war, to which the President's message at the opening of the present session called the attention of the house. It cannot be forgotten, that, during the two first administrations of the federal government, the president, at the commencement of every session of congress, met in person the two houses, convened together, and pronounced the address which his secretary now conveys to us in the form of a message. In relation to every part of the address, the two houses separately exercised the unquestioned right of responding. These responses brought into brief review the whole course of administration. All the political acts and the actors of the past year were held open to the scrutiny and opinion of either house.

Such was the operation given to this government by the framers of the constitution, who filled the first congress which assembled after its ratification. Such continued to be its operation for the first twelve years of its existence.

During the last eighteen years, this practice has been disused, but it would be difficult to prove that the powers of this house have been abridged, by the substitution of the President's message for his speech. Like the latter, the former yet undergoes, at the opening of each session, a political analysis; which terminates in the reference of every important member of it to some committee, charged with the duty of reporting an opinion upon the subject which it embraces, and of recommending, if necessary, some correspondent act of legislation. Hence the origin of the report which has given rise to the present debate.

Is it not absurd to imagine, even, said Mr. M. that the President of the United States can apprise this house that its highest powers have been usurped; that the constitution has been violated—and yet no complaint can be made of the usurpation, nor any exertion to prevent its recurrence?

The history of our government, Mr. Chairman, is replete with enquiries analagous to the present. Need I remind you of that, into the conduct of the first secretary of the treasury? Of the subsequent enquiry into the

failure of St. Clair's expedition against the North Western Indians? Or of the more recent investigation of the causes which led to the destruction of the capitol?

Were it necessary, these authorities could be corroborated by a reference to the long established practice of that legislative assembly after which our own has been modelled.

The existence of a power of legislation implies the auxiliary authority to inquire into all those abuses or defects of the laws, which may, by any possibility, call for its exercise.

If, indeed, in the progress of our present inquiry, the character of Gen. Jackson, or of the executive, shall suffer in the public estimation, such, although it should prove an unavoidable consequence, will not have constituted the motives of our investigation.

Remembering, as I do, Mr. Chairman, with feelings common to us all, the triumph of the American arms on the plains of New Orleans, I need scarcely say, that I entertain no personal hostility to the commander of our southern army. I frankly acknowledge, too, sir, that I cannot, in this enquiry, wholly separate the President of the United States from the military officer, whose conduct he has approved. And yet, it can hardly be required of me to say that I entertain no personal hostility to our present chief magistrate. Sir, I behold in him the friend of my early youth; a yet more sacred feeling swells my heart—he was, sir, my father's friend.

Nor do I entertain any settled hostility to the administration over which he presides. I expressed, beyond these walls, a different sentiment, at a time, and under circumstances, which prevented its public avowal from advancing either my personal interest, or my political consideration.

Still less, sir, have I been an enemy of the army, whose conduct I am about to investigate. I appeal to the recollection of the house, if I did not zealously, though, indeed, most unsuccessfully, endeavor to preserve to those gallant men, who had merited and received the thanks of their country, the pecuniary reward of their valor, which had been granted to them by the justice, and confirmed to them, as I vainly thought, by the faith of the nation. I, too, Mr. chairman, in a humble path, ardently sought to follow their bright example; and the party in Virginia, whose political denomination I bear, never yielded to their more fortunate opponents, in devotion to the commonwealth.

Sir, the friends of these resolutions are the best friends of the army. Let the army gain an ascendancy over the

government, and it will become an object of jealousy with the people. They will esteem it a smaller evil to disband the army, than to surrender their constitution. The adoption of the resolution, is, therefore, essential to the preservation of our present military establishment. If the resolutions fail, the army *ought to be*, and *will be reduced*.

About to enter upon a wide field of debate, to consult numerous authorities and documents, I cannot hope, at this late hour, to command the attention of the committee, and respect for their comfort, sir, induces me again to make way for a motion that the committee rise.

The ensuing morning Mr. Mercer proceeded.

Having sought, Mr. chairman, to remove some of the prejudices which obstructed my way, and established the constitutional power of the house to pass the resolutions on your table, I shall proceed to enquire into the origin and conduct of the Seminole war. In the prosecution of this enquiry, I mean to establish the following propositions:—

That the constitution of the United States has been violated, by an unauthorised war against the Indians of East Florida.

That, it has been farther violated by the unauthorised capture of the Spanish fortresses of St. Marks, of Pensacola, and the Barrancas, during a period of peace between Spain and the United States.

That, the rules of judicial proceeding, established by the laws and usages of the United States, in the trial of military offences by courts martial, have been disregarded, in the trial and execution of Arbuthnot and Ambrister.

That, the accustomed clemency of the United States, in all former wars, has been outraged, by the unnecessary execution, in cold blood, of unresisting captives, brought within the power of our arms, by the chance of war.

And, lastly, that these accumulated abuses of power call not only for the expression of the opinion of this house, but for the interposition of its authority to prevent their repetition.

I find myself arrested, Mr. chairman, on the very threshold of my first proposition, by the assertion of one of my colleagues, (Gen. Smyth) that the Indians cannot wage war; because, he added, they do not make prisoners of war: while another honorable member (Col.

Johnson) who preceded him, on the same side of the question, maintained, that our statute book contains a declaration of perpetual war against all the Indian tribes within our limits. Let the statute book answer these extraordinary doctrines. The aborigines of this country have been our associates, or our neighbors, for more than two centuries : and we have maintained towards them, during that period, relations of commerce and amity as well as of war, by the same means by which we have regulated our intercourse with other states. Instead of recurring to the treaty and correspondence of Ghent, allow me to consult the volume which I hold in my hand, and to ascertain, from our own intercourse with this unfortunate race of men, in what light we have hitherto regarded them. To ascend no further back than to the formation of our Union, the first volume of the laws of the United States will afford us Indian treaties, embracing every variety of stipulation known in the diplomatic intercourse of the most polished nations; from the articles of agreement and *confederation* with the Delaware nation, a treaty of alliance and commerce, concluded at Fort Pitt in 1798, down to the articles of agreement and capitulation, a treaty of conquest, but of peace, also, concluded at Fort Jackson in 1814. Indirect contradiction of the assertion of my colleague we find, among the intermediate conventions, stipulations for the mutual exchange of prisoners of war ; and, in hostility with the doctrine contended for by the honorable member from Kentucky, the far greater number of them are treaties of peace, promising the oblivion of past injuries, and the establishment of perpetual friendship. Nor will a recurrence to the history of the United States authorise an unfavorable comparison of the good faith of these untutored savages with that of our more polished European allies. With the Chickasaw and Choctaw nations, we have made several treaties of boundary, but have had occasion to make no treaty of peace, since that of Hopewell, concluded two and thirty years ago, under the old confederation. The treaty of Greenville, with the North Western Indians, endured from 1795 till the battle of Tippecanoe, in 1813. The first treaty with the Creeks and Seminoles, concluded with the White Chief McGilvray, in New York, in 1790, was, with the exception of some border hostilities with Georgia, of questionable origin, and terminated by the treaty of Colerain, in June, 1796, preserved inviolate till 1815. Compare these dates, sir, with those of our treaties with England, France and Spain. Call to mind the repeated violations of these treaies, and then ask your conscience if it will permit

you to cast an imputation of bad faith on your savage neighbors?

In all these treaties, Mr. Chairman, the Indians are denominated *tribes* or *nations*; they are all negociated and signed with the usual solemnity of national compacts, and were ratified under the old confederation, as they have been under our present constitution of government, by the same authority, and in the same manner, as our other foreign alliances. In none of them will the least foundation be discovered for the claim now set up, to regard the Indians as the lawful *subjects* of our government. No, sir, the God who gave them being gave them freedom too, and, while we have voluntarily promised them protection, they have never sworn to us allegiance.

The treaty of New York, with the Creeks and Seminoles, like that of Greenville, and almost every other original treaty with the Indian nations in our territory, carries the recognition of their independence so far as "to 'declare that every American citizen who shall attempt 'to settle within their territory, shall forfeit the protec-'tion of the United States, and may be punished at their 'pleasure." The guarantees of their reserved territory, which distinguish their numerous treaties of peaceful cession, are not more inconsistent with their independence, than the celebrated guarantee of our liberty by France was inconsistent with our acknowledged sovereignty; or our guarantee of her West Indian Islands with their dependence upon the mother country.

Sir, it is a maxim of experience that, as man acquires power, he forgets right. The first of the numerous treaties to which I have adverted, if compared with the last which we have concluded with the friendly Creeks, or with the doctrines lately maintained on this floor, will furnish a striking illustration of this melancholy, but ancient truth. The former treaty, throughout all its numerous provisions for the passage of troops—for the trial of fugitives from justice, and for commercial intercourse, not only regards the Delaware nation as a sovereign and independent people, but, after repelling the insinuation that the United States design to exterminate them, and possess their country, guarantees to them their whole territory, and tenders to them an admission into the American Union, as a co-ordinate member of the confederacy.

There is a doctrine of national law inserted in two of our earliest treaties, which is worthy of being held in perpetual remembrance. In each of our separate treaties with the Choctaw and Chickasaw Indians, concluded at Hopewell, in 1786, there is this stipulation, which not

only recognizes the Indian right of war, but seeks to regulate its exercise, in conformity with those maxims of humanity, from which, to the honor of our country, it has but recently departed. "It is understood," say we to these Indian nations, and they to us, "that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practised on either side, except where there is a manifest violation of this treaty, and then it shall be preceded first by a demand of justice, and, if refused, then by a *declaration of hostilities.*" What is this but that law of nations so often misquoted or misapplied in the course of this debate?

Sir, who are the Indians of East Florida? Those very Seminoles with whom we treated at New York, by their white chief, McGilvray, and the wretched Creeks, who, refusing to ratify the treaty of Fort Jackson, fled from the bloody field of Talapoosa, to the only asylum left open to their retreat. Man has a natural right to live somewhere on the earth. A civil war had raged among the Creeks; we united our arms with the weaker party, and when victory declared in our favor, we made a bargain with our friends, articles of capitulation for the territory of our enemies, and demanded of the former to deliver up all the prophets and instigators of the recent war, whether foreigners or natives, who had not submitted to the arms of the United States, if ever they shall be found in the Creek territory. They fled, sir, and with reason, to Florida. Did they afterwards return to make war on us? No, sir, the President's message at the opening of the last session of Congress informed us that we were then at peace with all the world. These *wretched* Seminoles and their miserable *allies,* the *fugitive* Creeks and negroes, had not then invaded our frontier. They were beyond the limits of the United States, occupying towards us the relation of an independent people—the relation under which we had treated with them for peace, at New York and Colerain—and under which, *even in our Spanish treaty of* 1795, we had expressly reserved the right to treat again with them for the same object. They *were at peace* when detachments of our army and our fleet invaded their territory, without the authority, I yet hope, of the American government; blew up their only fortress, and scattered over the surrounding plain the burnt and mangled bodies of two hundred and seventy unoffending Negroes and Indians. Sir, this massacre occurred in East Florida, 200 miles from the Georgia settlements, and 15 months before it is even pretended that these unhappy people had renewed their outrages within our territory. Nay, after those outrages did occur,

the message of the President, as we have seen, announced that we were at peace. The seizure of Amelia Island, sir, was justified on the ground that, if the brigands who landed there were a foreign power, a secret law of the United States, then first published to the world, in order to warrant that act, authorized the President to occupy the territory in question. But the Indians of East Florida were not a foreign power, and they were not brigands, as our former treaty with them sufficiently evinces. Their right to wage war against Spain herself was as perfect as the recognized right of our Indians to wage a war on us.

Nor had we a right, either as regarded them or Spain, who claimed the sovereignty of their territory, to force a passage through it, as we did, even had our object been peaceable. Is it required of me to establish this principle of public law? I shall adduce, for that purpose, but a single authority. It is that of a writer who, himself the subject of a small principality allied to the free Cantons of Switzerland, and claiming the protection of a sovereign who had often to contend for his own independence, has applied the maxims of natural reason to the maintenance of political truth and justice. "When some petty officers," says Vattel, "violated the territory of Savoy, in 'order to carry off from thence a noted smuggling chief, 'the King of Sardinia caused his complaints to be laid be-'fore the court of France, and Louis XV. thought it no 'derogation to his greatness to send an ambassador ex-'traordinary to Turin, to give satisfaction for that vi-'olence."

"Since," says the same writer, "the passage of troops, 'and especially that of a whole army, is by no means a 'matter of indifference, he who desires to march his 'troops through a neutral country must apply for the *so-'vereign's permission*. To enter his territory *without his 'consent*, is a violation of his rights of sovereignty and su-'preme dominion." "If the neutral sovereign has good 'reason for refusing a passage, he is not obliged to grant 'it." "In all doubtful cases we must submit to the 'judgment of the proprietor respecting the innocence 'of the use we desire to make of things belonging to 'another, and must *acquiesce in his refusal, even though we 'think it unjust*. When the passage is not of *absolute ne-'cessity*, the bare danger which attends the admission of 'a powerful army into our territory may authorize us to 'refuse them permission to enter." "Let it not be said, 'with Grotius, that he who requires the passage, is not to 'be deprived of his right on account of unjust fears. A '*probable fear*, founded on good reasons, gives us a right 'to avoid whatever may realize it; and the conduct of

'nations affords but too just grounds for the fear in ques-
'tion." "The Switzers, in their alliances with France,
'have promised not to grant a passage to her enemies:
'they *ever refuse it* to all sovereigns at war, in order to
'secure their frontiers from that calamity; and they take
'care that their territory shall be respected." To this doctrine the only exception admitted, is in favor of *urgent and absolute necessity.* "As where an army find
'themselves exposed to imminent destruction, or unable
'to return to their own country, unless they pass through
'neutral territories, they have a right to pass in spite of
'the sovereign, and to force their way, sword in hand.
'But they ought *first* to request a passage—to offer securities, and pay for whatever damage they may occasion.
'Such was the mode pursued by the Greeks, on their
'return from Asia, under the conduct of Agesilaus."

The author here supposes the passage to be for an innocent purpose; to have been asked of the sovereign, & to be forced, after a refusal, only in a case of extreme necessity.

It has not, and I presume will not be pretended, that the destruction of the negro and Indian fort near the mouth of the Appalachicola, was required by any absolute necessity. The Governor of Pensacola, so far from authorizing the act, expresses his expectation "that until
'he receives the decision of his Captain General, no steps
'will be taken by the government of the United States, or
'by General Jackson, prejudicial to the sovereignty of
'the King of Spain, or the district of Appalachicola, a
'dependency of his government." It cannot be pretended that this hostile measure was taken with the consent of the Seminole Indians; and if, as I hope, it was done without the order of the President of the United States, it was certainly without any legitimate sanction—the authority of Congress.

If the alleged reason for this wanton injustice were deemed sufficient to warrant it, "that the fort had become a refuge for runaway negroes and disaffected Indians," where would it carry us? With what neighboring nation, civilized or savage, could we preserve relations of amity? Will it be pretended that we have a right to punish disaffection in those who owe us no allegiance; or to recover by violence the persons of our fugitives, whether bond or free? The attempt to gloss over this cruelty, by the suggestion that the force of the miserable negroes was "daily encreasing, and that the fertile banks of the Appalachicola were about to yield them every article of subsistence," is calculated to shed additional horror over a transaction wanton in its motive, and savage in its execution. A war upon the peaceful negro settle-

ments on the Wabash would be equally politic, and in principle, alike justifiable.

I have thus traced the Seminole war, Mr. Chairman, to the unauthorised invasion of East Florida in 1816: but from thence, to the month of October of the ensuing year, the terror inspired by this act seems not to have produced the usual retaliation of savages, the indulgence of private revenge. Along a line of four hundred and seventy miles, from the mouth of the St. Mary's to the intersection of the Perdido by the 31st degree of latitude, we hear, in fact, of scarcely an Indian aggression. The destruction of their fort, and the murder in cold blood of two of their chiefs, must have inspired the sentiment of hostility, but they wanted the means of indulging it. Even at the moment when the friendly Indians of Fowl town, who had preserved their neutrality, during the whole Creek war, were assailed by order of the American General, there had been no invasion of our territory by any Indian force. Stories, indeed, sir, have been told us of Indian massacres, at the recital of which, my very soul sickened; and were it not for the documents on our table, I should believe that the tomahawk and scalping knife had deluged our southern frontier with blood. But, in addition to the President's declaration on the 16th of November, 1817, that we were at peace with the Indian tribes, I discover that, with but two exceptions, the murder of a family on St. Mary's river, and of some travellers 500 miles off in the Alabama territory, transactions which I deplore as much as any man, we were ourselves the aggressors. The unfortunate detachment of Scott, the attack upon which is said to have given a new character to the Seminole war, and to have justified the invasion of Florida, fell a victim to savage revenge, upon the river Appalachicola, without the territory of the United States. After the destruction of the Indian Fort, in the preceding year, was it too much to expect that the Seminole Indians would resist the progress of another armed force through the bosom of their territory? Had they to consult authorities for the right of self-defence? They recurred to that which nature has stampt upon the hearts of all men. Sir, these Indians are represented to have been sufficiently powerful to be the objects of our fears. They must be regarded as independent of us from our own express acknowledgement. Spain asserted that they had subverted her sovereignty; and, under our constitution, war could not be waged upon an independent neighboring power without the authority of Congress. At one moment, indeed, we hear the Indians of East Florida styled, wretched savages, outlawed Creeks, fugitive

slaves. At another, they are represented to be capable of bringing a force of 3500 men into the field, a force equivalent to half our military peace establishment, and the most alarming necessity is plead to justify the infraction of the neutrality of Spain in our hostilities against them.

This necessity brings me to the second infraction of the constitution by the entrance of Florida, and the seizure of the Spanish fortresses of St. Marks, Pensacola, and the Barrancas. In regard to the much questioned passsage of the line, I have only to add, that, with the exception of the right reserved by our treaty of 1795, to make peace with the Florida Indians, we have ever regarded the sovereignty of Spain to be complete over the Indian territory within her limits. And the hostile invasion of that territory is as much an act of war against Spain as against the Indians themselves. Being equally unauthorised by any act of Congress, it involves a similar violation of the constitution. Our attention, however, is borne along from the Florida line to less questionable infractions of the neutrality of Spain. That the forcible seizure of the Spanish fortresses would be an act of war against Spain, unless accompanied by some extraordinary ustification, is not denied. But, it is defended on the ground of necessity, as regards St. Marks; and, as respects Pensacola and the Barrancas, for the additional reasons, that the Spanish governor refused to allow the passage of provisions up the Escambia; and, by a public threat, rendered the seizure of those fortresses essential to the maintenance of the honor of the American arms. This reasoning is further attempted to be sustained by reference to the obligations of Spain to restrain, by force the Indians within her territory from committing, it is said, hostilities against the United States.

Allow me, Mr. Chairman, briefly to consider the nature of this Spanish obligation, which appears to me to have been altogether misunderstood. The 5th article of the Spanish treaty of 1795 stipulates "that Spain and the U. "States shall restrain, by force, all hostilities on the "part of the Indian nations living within their bound-"ary," an obligation which is afterwards thus explained— "So that Spain will not suffer her Indians to attack the "citizens of the United States, nor the Indians inhabit-"ing their territory; nor will the United States permit "those last mentioned Indians to commence hostilities a-"gainst the subjects of his Catholic Majesty, or his In-"dians, in any manner whatever." The residue of the clause prohibits either party from making with the Indians, within the territorial limits of the other, any future

alliance whatever, except *treaties of peace.* This stipulation not only supposes the possibility of future wars between the Indians and the contracting parties, but as the employment of force by either party, to suppress Indian hostilities, against the other, is evidently founded on a perfect reciprocity of duty and interest, the interposition of force by either, for the purpose of of restraining the Indians, is expressly limited to the *commencement* of *hostilities.* Spain will not permit her Indians to attack, that is, to commence hostilities against the citizens of the United States. But the treaty does not impose upon her the unnatural and unreasonable obligation to aid the United States, in attacking the Indians, who inhabit her territory, and whom she considers under her protection. Spain must be regarded as the natural ally of her own Indians, but, did this treaty bind her to an offensive and defensive alliance with us, against them, either of two conditions would release her from the obligation which it imposes.* Her inability to fulfil it; or her incapacity† to do so, without exposing herself to evident and imminent danger; to say nothing of her right to enquire into the origin of our war. When the United States were called upon to fulfil their guarantee to France, of her West India Islands, we replied that France began the war in which she was engaged with Great Britain. But the relation of Spain, to the Indians within her acknowledged limits, cannot be regarded as less intimate than a defensive alliance; and, so considered, the conduct of the Spanish Governors of St. Marks and Pensacola falls far short of making them associates in the war; but, if it did make them associates, their acts were then acts of war against the U. States, which it was the province of Congress, and of Congress alone, to resent by war. My honorable colleague (Mr. Barbour) though he does not concur in this conclusion, has candidly admitted that the Spanish Governors were not associates in the Seminole war. Regarded as the allies of the Indians, if they went no farther than to maintain with them their accustomed intercourse of commerce and friendship, still, this would not constitute them the associates of our enemy. "The contrary principles," says Vattel, "would tend to multi-"ply wars, and spread them beyond all bounds, to the "common ruin of nations. It is happy for Europe, he "adds, that, in this instance, the established custom is "in accord with the true principles. Switzerland, in "virtue of her alliance with France, furnishes that crown

*Vattel, page 326. † Vattel, page 326.

"with numerous bodies of troops, and, nevertheless, "lives in peace with all Europe." "*The real associates* "of my enemy being my enemies, I have against them "the same rights as against the principal enemy. But it is "not thus, with those nations which assist my enemy, in "a defensive war; I cannot consider them as his associ- "ates. If I am entitled to complain of their furnishing "him with succors, this is a new ground of quarrel be- "tween me and them. I may expostulate with them, "and, on not receiving satisfaction, prosecute my "right, and make war on them. But, in this case, "there must be *a previous declaration.*" "Grotius," says Vattel, "appositely quotes the example of Ulyssus, "and his followers—blaming them for having, without "any declaration of war, attacked the Cicouians, who "had sent succours to Priam, during the siege of Troy."

And if a previous declaration of war is required, where the powers of declaring and waging war are trusted to the same discretion, how much more necessary is such a declaration, where the constitution of a nation vests the power of making the declaration in one department, and of conducting its operations in another branch of its government.

To have constituted the Governors of St. Marks and Pensacola associates in the war, they should have lent their whole aid to its prosecution, which is not even charged upon them.

I will now proceed to consider the alledged *necessity* of seizing those fortresses. And, first, that of St. Marks. General Jackson, as early as the 25th day of March, soon after crossing the Florida line, announced his intention of taking St. Marks "as a depot for his supplies, should "he find it in the possession of the Spaniards, they "having supplied the Indians." That he derived no right to take it from the latter use of it, I have already demonstrated, and that he derived none from the use which he meant to make of it himself, an attention to the local position of St. Marks will readily evince. St. Marks is situated 104 miles to the northwest of the Suwanee towns, the main object of General Jackson's campaign. It stands on the bank of the river to which it has given or owes its name, and nine miles above its mouth. The Fort is surrounded by an open prairie, about two miles across, and below it extends an open forest of pine. As a military depot, a position below St. Marks, on the same river, would have been more accessible to the vessels, which were to furnish supplies from New-Orleans; and the labor of a fatigue party, for a few days, would have constructed, of the adjacent forest, a protection sufficient-

ly strong to resist the attack of any savage force which could have threatened the safety of the position. Such is the necessity, on which this infraction of neutral right is grounded. The Spanish fort deriving its supplies, also, from the water, would have been dependant on the American, and the danger of an Indian attack, which threatened St. Marks, before the arrival of the American army, had ended with its approach. Nor is it the least extenuation of this unauthorized act of war, that discoveries were made, after the capture of the fort, which evinced that its commander was unfriendly to the American arms. The antecedent act should be tried by its own evidence. The subsequent discoveries, if they amounted to any thing, constituted, as I have remarked, a cause of war against Spain, which General Jackson had no right to declare, or to wage, *without* a declaration.

St. Marks was more than a hundred miles from the Suwanee towns. To reach Pensacola, it was necessary to march across West Florida one hundred & fifty miles further from the principal theatre of the war. The necessity, however, which urged the occupation of the capital of West Florida is, if possible, less apparent than that which was plead for the seizure and occupation of St. Marks. The defeated Indians had retired down the Peninsula of Florida, or crossed over it towards St. Augustine. Fort Gadsden and the Appalachicola river, to say nothing of St. Marks, then in our possession, cut off their retreat upon Pensacola. Above Pensacola itself, on the Canuco, a branch of the Escambia, Fort Crawford served as a check upon the Indians in that vicinity, and 50 miles from this last position stood the American fort Montgomery, on the Alabama. The desart country between the Appalachicola and the Bay of Pensacola contained neither Spaniards nor Indians; yet, on the 5th of May, after having discharged a part of his force, and proclaimed the war to be at an end, General Jackson announces to his government his intention to occupy Pensacola, if certain reports, which he had heard, should prove true, while the whole tenor of his letter of that date evinces a determination to occupy it at all events. He expresses it to be his confirmed opinion, "that, so long as Spain has not the power 'or will to enforce the treaty, by which she is solemnly 'bound to preserve the Indians within her territory at 'peace with the United States, no security can be given 'to our southern frontier, without occupying a cordon 'of posts along the sea shore." After the seizure of Pensacola, he enforces the same reasoning, in an argument in favor of its restoration.

In his preceding letter to the Secretary of War, of the

25th of March, he informs him, "that, finding it *very* 'difficult to supply Fort Crawford, on the Canuco, by 'land, he had ordered the *supplies* for that garrison by 'water" up the Escambia, that is, by Pensacola, and through the Spanish territory: and that he had "written to the governor of Pensacola, that if he interrupts 'them during the present Indian war, he shall view it as 'aiding the enemy, and treat it as an act of hostility." In his letter to the Governor, written on the 23d of May, the day before he entered Pensacola, he tells him, "that, by 'a reference to my communications of the 25th of March, 'you will see how far I have been the aggressor in the 'measure protested against. You are there, (he adds) 'distinctly advised of the objects of my operations; and 'that every attempt, on your part, to succor the Indians, 'or prevent the passage of my provisions in the Escambia, would be viewed as *hostile acts* on your part." Rejecting the vague reports, mentioned in his letter to the Secretary of War, of the assemblage of the Indians, in force, in the vicinity of Pensacola, General Jackson here evidently rests his authority to seize Pensacola on the ground which he had assumed on entering Florida, of the necessity of supplying Fort Crawford with provisions, by a passage through the territory of Spain, and the right to consider the refusal of that passage as an *act of hostility.* In his letter to the same officer, of the 27th of April, he, in fact, assumes the prerogative of declaring war: "America," he writes, "just to her treaties, and 'anxious to maintain peace with the world, cannot, and 'will not, permit such a savage war to be carried on in 'disguise any longer. Asylums have been granted to the 'persons and property of an Indian foe, fugitives from 'the territory of the United States. Facilities, deemed 'by me necessary to terminate a war, which, under existing treaties, should have been maintained by Spain, '*for feeding my troops*, and liberating the subjects of 'Spain, imprisoned by the Indians, have all been denied 'by the officers of his Catholic Majesty. All these facts 'prove the unjust conduct of the Spanish agents in Florida. It cannot longer be tolerated; and, although a 'republic, fond of peace, the United States know her 'rights, and, *at the expense of war, will maintain them.*"

— In deciding upon the *necessity* of supplying Fort Crawford with provisions, by the Bay of Pensacola and the Escambia, the committee must be already struck with the language in which General Jackson himself describes it. Finding it *very difficult* to supply Fort Crawford, on the Canuco, *by land*, he resolved to supply it by *water*. Here is no necessity—none that could justify the consideration

of a refusal to permit the passage of provisions through a neutral country, as an act of hostility. Most truly does General Jackson speak of the *difficulty* only of obtaining the supplies by land; and in his letter to the Governor of Pensacola, in which he apprises him, that he has ordered a supply of provisions to be sent from New Orleans, by way of Pensacola, to Fort Crawford, on the Canuco, he adds, that this route has been adopted, as *the most speedy one of provisioning one of his garrisons.*

Sir, when you cast your eyes on the map near you, and recollect that part of the supplies of Fort Scott, on Flint river, were obtained from Fort Montgomery, at the distance of many hundred miles; and when you perceive that the river Alabama connects the latter with the port of Mobile; that from Fort Montgomery to Fort Crawford there is a public road, of 50 miles only in extent; you will readily comprehend the nature of that necessity urged, not by General Jackson, but by his friends in this House, and especially by one of my honorable colleagues, (Gen. Smyth) as a justification of the seizure of Pensacola. But, if the land carriage of 50 miles, for the provisions required to supply a garrison, consisting of 100 men, was a serious impediment to the military operations of General Jackson, allow me to point out another channel, which would reduce this transportation, by land, to half that distance. The Perdido river, I am warranted, by an honorable Delegate in this House, in representing to be navigable to the Florida boundary, in boats drawing less than 18 inches water, and from a point on that river, opposite Fort Crawford, the distance over land is but 25 miles.

But, let the difficulty of obtaining supplies for Fort Crawford by any other channel than the Escambia be magnified to any extent, did the Governor of Pensacola refuse to grant the request of Gen. Jackson? No, sir, the complaint of such refusal is reduced, at last, to the narrow ground, that *exorbitant duties* are charged on the entry of the provisions at Pensacola. The whole necessity, therefore, is resolved into the expense of paying those duties. Sir, the resources of the U. States do not require, that, to save the duties, however exorbitant, (and their amount is no where stated,) upon the provisions necessary for the supply of one hundred men, the sovereignty of an independent nation should be trampled under foot. But, even this plea for occupying Pensacola is finally removed, by a letter of the Governor to Gen. Jackson, dated six days before its seizure, in which he says, "that, with respect to the passage of provisions up 'the Escambia, I have not hitherto prevented it. And,"

he proceeds, "now that the free commerce of this people 'with that of the interior is declared admissible, by higher authority, there will in future be no difficulty in allowing the merchants to transfer from hence to Fort 'Crawford, and other forts on the frontier, as well by 'water as by land, *whatever provisions and effects* they 'may *need or desire*, by which means these posts will 'readily be provisioned, and your excellency will be satisfied." Not so, however; Gen. Jackson had advanced too near his object to be thus diverted from it; and as the necessity of occupying Pensacola, in order to ensure the safe transportation of his supplies, had ceased altogether, a new reason occurs to sanction the measure. "On my march, on the 23d of May," says the general, in a letter to the Secretary of War of the 2d of June, "a 'protest from the Governor of Pensacola was delivered 'to me by a Spanish officer, remonstrating, in warm terms, 'against my proceedings, and ordering me and my forces '*instantly to quit the territory of his Catholic Majesty, with 'a threat to apply force, in the event of a non-compliance.*" This, adds the general, was so open an indication of a hostile feeling on his part, after "having been early and 'well advised of the object of my operations, that *I he-'sitated no longer* on the measures to be adopted. I 'marched for, and entered Pensacola, with only the show 'of resistance, on the 24th of May." Sir, let us examine the language in which this threat was couched, and ascertain whether it was of the character described by Gen. Jackson, or of such a character that the honor of the army required it to be resisted by the seizure and occupation of Pensacola and the Barrancas. "It having 'come to my knowledge," writes Gov. Mazot, "that you 'have passed the frontiers, with the troops under your 'command, and that you are within the province of West 'Florida, which is subject to my government, I solemnly 'protest against this procedure, as an offence towards my 'sovereign, exhorting you, and requiring of you, in his 'name, to retire from it, *as, if you do not, & continue your aggres-'sions, I shall repel force by force.*" To which he adds, "as the 'repeller of an insult has never been deemed the aggressor 'you will be responsible both to God and man for all the fa-'tal consequences which may result." Is this an order to Gen. Jackson and his force "*instantly to quit the territory of Spain, with a threat to apply force in the event of a noncompliance?*" *If you do not, and continue your aggressions, I shall,* said the Governor, *repel force by force.* What force? The entry into Florida. That occurred very early in March; and this protest is dated on the 24th of May, though doubtless written on the 23d, for

the aid of Gen. Jackson certifies that it was received, on that day, from a Spanish officer, who met the American army on its march, shortly after it had crossed the Escambia river; and, consequently, when General Jackson was within a few miles of Pensacola.

Neither the object of the American commander, nor the nature of this threat, could then be mistaken. It was, that, if Gen. Jackson *continued his aggressions*, by attacking Pensacola, *force would be repelled by force.* In the Governor's letter from the Barrancas, of the following day, you have his explanation of this threat. "Your excellency," he writes, "lays to my charge the blood 'which may be shed by my refusal to deliver up the province, as your excellency requests, which I shall never 'do, nor can I, without covering myself with dishonor at 'the close of my life and of my long military career. I 'am firmly persuaded your excellency would, in my case, 'do the same, as you would not venture to stain the honorable laurels with which you are adorned. I expect, 'from the generosity of your excellency, first, that you 'will set the officers and troops that garrisoned Pensacola at liberty, and that, after supplying your army with 'provisions, you will shortly evacuate the territory of this 'province, and not carry on a partial war against West 'Florida at a time when our nations are in profound 'peace. Finally," he adds to this conciliatory letter, "if, 'contrary to my hopes, your excellency should persist 'in your intention to occupy this fortress, which I am 'resolved to defend to the last extremity, I shall repel 'force by force; and he who resists aggression can never 'be considered an aggressor."

In the subsequent proceedings of Gen. Jackson, a more striking illustration is offered of the extent to which his conduct was influenced by this threat. Not satisfied with the seizure of Pensacola, without resistance, he proceeded fourteen miles below it, invested, and, after a heavy cannonade of many hours, took the fortress of the Barrancas and the Governor, by capitulation. Nor did he stop here; but, regarding the Spanish troops as prisoners of war, and all West Florida as a conquered country, he shipped the former to the Havana, and usurped over the latter the civil, as well as military, administration. One of my honorable colleagues has, with singular felicity, offered the same apology for these *defensive* measures of the American commander which he allows to the Emperor of France for subverting the Prussian monarchy. The honor of the French arms required that a threat should be repelled! Sir, the force of the argument will appear very nearly the same, in both cases, when re-

ference is had to the relative strength of the combatants; but there is this remarkable difference between the Emperor of France and Gen. Jackson, that the former was the acknowledged sovereign of France, and the latter had merely usurped the authority of Congress to make war upon a foreign state. Whether Gen. Jackson's conduct was in obedience to his orders, as my hon. colleague (Gen. Smyth) has so earnestly & ingeniously maintained, is a question between him and the authority from which he derived them, except so far as regards the pernicious example of military insubordination, which is afforded by the impunity of this act. But my hon. colleague will be sensible, on mature reflection, of the embarrassment to which he exposes himself when he seeks to get rid of the express limitation contained in the order of the 16th of December, not to attack the Seminole Indians should they shelter themselves under a Spanish fort, but to notify the Executive of the fact. My colleague has contended, that, as the Indians never did seek shelter under the walls of a Spanish fort, this order should be construed as if the limitation which it contains had constituted no part of it. In other words, although Gen. Jackson had no authority to attack a Spanish fortress, which protected the entire army of our enemy, he had a right to attack such fortress without any such provocation or necessity. Sir, in relation to these orders, it is proper to remark, that, departing from military usage, the government assigns to the officer charged with their execution, reasons for the restraints which they impose on his authority. "The state of our negociations with 'Spain, and the temper manifested by the principal Eu-'ropean powers, make it impolitic, in the opinion of the 'President, to move a force at this time," fourteen days only before the order which I have quoted, "into the Spanish possessions, for the mere purpose of chastising 'the Seminoles for the depredations which they have 'heretofore committed." And if policy required this abstinence, what shall be said of the seizure of the capital of West Florida when these Indians had been chastised, and all the professed objects of the invasion of their territory attained? Such, sir, was the exposition given of his orders by the President himself, in announcing to Congress that he had authorized the American army to cross the Florida line; and, notwithstanding his refusal to censure Gen. Jackson for disobeying them, such must have been the construction given to them, by the President, when, on the 14th of August last, he ordered the restoration of the conquered posts and territory to Spain.

Much, Mr. Chairmain, has been said, in the course of

this debate, of the motives which induced the American commander to depart from his orders. An hon. colleague of mine, (Mr. Barbour) while he has asserted, that necessity would have justified Gen. Jackson, has admitted, although he means to vote against the resolutions on your table, that there existed no such necessity for seizing either St. Marks or Pensacola. He has told us, that there are degrees of the necessity which would warrant the seizure of a neutral fortress by a military commander. Sir, necessity, which is without law, can know no degrees: and my honorable colleague might as well attempt to resolve duration into time, or infinity into space, as such necessity into degrees. With the motives of Gen. Jackson, except as they illustrate his acts, this House have nothing to do. The conformity of those acts to the constitution of the United States, is the subject of our present enquiry. We are in the hall of the representatives of the people, asserting their rights, to have the constitution administered according to its true spirit. The course of argument of my colleague would be strictly pertinent on an indictment for murder. He might reduce the offence to manslaughter, or to excuseable homicide. Our present purpose is not the trial of a public offender, but the maintenance of our own constitutional powers. Sir, the very worst acts have been done with the very best motives. Political and religious enthusiasm have at times subverted the fairest constitutions of government, and shrouded Religion herself in blood. I repeat it, sir, I look, in this inquiry, to higher objects than the character and motives of Gen. Jackson—to our constitution and laws—to the character and genius of the American people.

The doctrines of our opponents, on this question, are more alarming, if possible, than the acts which they seek to justify or to excuse. If, as my honorable colleague contended, who addressed the committee some days ago, (Gen. Smyth) a declaration of war is nothing more than "a recognition that war exists;" what becomes of the constitutional authority of Congress—of all the restraints, which the constitution has sought to impose on ambition, improvidence, and corruption, by vesting the power of declaring war in the representatives of the nation? The examples derived from the practice of other nations, among whom declarations of war, it is remarked by Vattel, have fallen into disuse, are inapplicable to us, because they are inconsistent with the genius of our free constitution.

Alike extraordinary is the conclusion of my colleague, that, because the President is charged with the execution

of our laws, and treaties are the supreme law of the land, he may execute within the territories of Spain the provisions of a Spanish treaty; or the yet more extraordinary doctrine that all the powers of this government, which may at any time be exercised beyond the limits of the United States, are concentered in the hands of the President. This committee will pause before it sanctions doctrines, alike subversive of the independence and laws of other nations, and of the theory and maxims of our own constitution.

There is one objection urged to the adoption of the resolutions, which I deem it proper to notice before I quit this branch of my enquiry. It has been said by our opponents, that, without intending it, we are throwing the weight of our opinions in the scale of a foreign nation, between whom and our government a negociation is depending, which involves questions of great importance to the public prosperity.

On the other hand, several hon. gentlemen, on the same side of this question with myself, seem to have regarded it, as a duty to themselves, to disavow the direction thus given to their arguments, and to express sentiments bordering, at least, on hostility to Spain.

Allow me, also, Mr. Chairman, to say, that, although Spain, in my opinion has given us ample cause of war, I am decidedly opposed to a declaration of hostilities against her. We claim, I understand, as our western boundary, the territory west of the Mississippi, as far as the Rio de la Norte. If by treaty it is ours, let it be occupied by our arms; and having taken possession of that which belongs to us, let us tender to Spain the exchange of that part of it, adjacent to her Mexican possessions, for Florida, which she does not want, and which would be to us, of great value. If she shall now reject this proposition, the time must speedily arrive when she will perceive it to be her interest to accede to it. So far would I go, and no farther. Not from any apprehension of the power of Spain, but for reasons of policy, too obvious to require to be enforced. A war, even with Spain, would cripple that commerce, on the prosperity of which materially depends the future growth of our yet infant navy. In such a war, we would have to contend, not with Spain alone, but to encounter, under the disguise of a Spanish flag, the enterprize and resources of France, of England, and, I greatly fear, of some of the most abandoned of our own citizens.

Having, Mr. Chairman, consumed so much of the time of the committee on the first propositions, which I proposed to sustain, I shall pass, with more brevity, over the

last, which involves the character rather than the constitution of our government. In the enquiry whether the rules of judicial proceeding in the trial of military officers have been wantonly disregarded in the trial and execution of Arbuthnot and Ambrister, an unexpected difficulty is started by our opponents, who question whether the special court which tried them, was a court martial or a mere board of officers? It has not sufficed, it seems, that General Jackson informed the Secretary of War "that Arbuthnot and Ambrister were tried under his or-"ders by a special court of select officers, legally convict-"ed; legally condemned; and most justly punished:" or, that he calls the court a court martial wherever he speaks of it, whether in his letters or his general orders. His friends acknowledging their utter incapacity to defend him, on his own grounds, persist in denominating the court a mere board of officers. Its proceedings, they regard as subject to no legal restraint; its judgment, as mere counsel or advice, submitted to the discretion of the General, to be altered or extended, at his mere pleasure. Is their view then, sir, correct? Were Arbuthnot and Ambrister tried by a court martial, or merely examined by a board of officers? A court martial is either a general court for the trial of all offences whatever, or a regimental or garrison court for the trial of offences not capital. The former must consist of five, and may consist of thirteen officers. The latter cannot exceed three. A prisoner was here sentenced to death, and the assemblage of officers who sentenced him to that punishment consisted of thirteen; it was, therefore, either a general court martial, or no court at all. A general court martial is required by the rules and articles of war to consist of "any number of commissioned officers from five to thirteen; but it shall not consist of less than thirteen, where that number can be convened without manifest injury to the service." The court which tried Arbuthnot and Ambrister consisted of thirteen officers, with a supernumerary appointed to act, in case of unforeseen absence, or incapacity of any one of that number. A general court martial is required to have a judge advocate, whose duty it is to administer to the officers the oath prescribed by the 69th article of war, and to act as counsel for the accused as well as the court. The court which tried Arbuthnot and Ambrister had a judge advocate, who administered the oath required by law, and interrogated the witnesses. The prisoner may challenge any member of a general court martial appointed to try him. Arbuthnot and Ambrister were called upon to exercise this privilege. The prisoner before a court martial is regularly arraigned upon charges

and specifications filed against him. So were Arbuthnot and Ambrister. He is entitled to counsel if he requires it. Arbuthnot made application for counsel, and counsel was allowed him. A court martial sits with open doors, except when it decides a question; and then, the doors are closed. So proceeded the court which tried these prisoners. A court martial has only a limited jurisdiction both as to offences and persons. So this court decided, for, of the 3d charge and specification against Arbuthnot, the court decided, " upon the suggestion of a member, after mature deliberation, that it had no jurisdiction." A court martial can sit, unless by express permission from the officer creating it, only between certain hours of the day. This court was by order allowed to sit without regard to hours. In the organization of a general court martial, the members are seated alternately, according to rank, on each side of the President. So was this court arranged. A court martial records, along with a minute of its proceedings, all the testimony laid before it. So did this court. It is its special province to decide on the guilt or innocence of the accused, and on the punishment, if any, which shall be inflicted upon them. So was this court required to do, and so it did. A general court martial is required to pronounce upon every charge and specification exhibited against a prisoner. This court obeyed this requisition by acquitting the prisoner, Arbuthnot, of being a spy, and responding to all the charges & specifications against him except that, of which they disclaimed any jurisdiction. A general court martial cannot sentence a prisoner to death without the concurrence of two-thirds of its members. A concurrence of two-thirds of the court is here certified.

It was a general court martial, convened in virtue of a general order, " for the purpose of investigating the charges ' exhibited against Arbuthnot and Ambrister, and such ' others, similarly situated, as might be brought before it." It is, therefore, denominated, by Gen. Jackson, "a *special* court." All its proceedings were approved by Gen. Jackson; and his approval showed that his order had not been disobeyed. And yet, had this been a board of officers, they would not have presumed to make exception to their own jurisdiction over any matter, upon which, their opinion was asked by the commanding general; nor would they have invited the prisoner to challenge any one of their number. A supernumerary officer would not have been appointed; their proceedings would not have been with open doors; a concurrence of two thirds would not have been required to be certified; nor would an extension of their hours of sitting, by a general or-

der, have been at all necessary. Conforming in so many particulars to the articles and usages of war, it is to be greatly deplored that this court martial, and the general who convened it, departed from both in the most important essentials of justice. For neither the articles of war, nor the treatises on courts martial, authorised the trial of Arbuthnot or Ambrister, by the court which tried them. "For the persons" says Macomb, "who are subject to the military laws of the "United States, and amenable to be tried by courts mar- "tial, are all persons who are commisssioned, or on pay, "as officers, or who are enlisted, or in pay, as non-com- "missioned officers, or soldiers. All sutlers and retain- "ers to the camp, and all persons whatsoever, serving "with the armies of the United States in the field, though "not enlisted soldiers, all military store-keepers, com- "missaries, military agents, surgeons, surgeon's mates, "paymasters, quartermasters, chaplains; all officers, "conductors, gunners, matrosses, drivers, or other per- "sons, whatsoever, receiving pay or hire in the service "of the artillery or corps of engineers of the United "States, and all officers and soldiers of any other troops, "whether militia or others, being mustered and in pay "of the United States, when acting in conjunction with "the regular forces," and, by a special act of Congress, "all spies."

In this enumeration of persons subject to the cognizance of an American court martial, a search will be made in vain for a description corresponding with Arbuthnot and Ambrister, after the former had been acquitted of being a spy. Even where a particular offence is cognizable by a court martial, the character "of the "person determines whether it may be tried by a civil "or military tribunal. The harboring or concealing "of deserters is a civil, or military offence, according to "the state or quality of the person who commits it." If by a soldier, it may be tried by a court martial. If by a citizen, a law of the United States expressly provides that it shall be tried by a civil court. The same doctrine is established by the constitution, which provides, "that no person shall be held to answer for a ca- "pital, or otherwise infamous crime, unless on a present- "ment or indictment of a grand jury, except in cases a- "rising in the land or naval forces, or in the militia, when "in actual service, in time of war or public danger."

But the mode of trial was not less exceptionable, than the jurisdiction of the court. The proceedings of the court are marked, alike, by the exclusion of competent

testimony offered by one of the accused; and by the admission of incompetent testimony against him. The following rules of evidence are laid down by the best American author on this subject, an author to whom the committee has referred us, as in common use, and who is known to this house, from having received its thanks for his distinguished gallantry. "The evidence," says Macomb, "on trials by court martial, is the same that is required in civil prosecutions."

"In all cases, where a party would avail himself of the "incompetency of a witness, on account of his convic- "tion of a crime, it is necessary that he should produce "to the court the record of conviction, or a sufficient "proof of it." Yet, before any trial, the testimony of Ambrister was rejected as incompetent, when offered by Arbuthnot, in his defence.

"Letters of correspondence and all familiar writings "must be proved, upon oath, to be written by the per- "son, of whose hand writing they are alleged to be." Yet, the letters ascribed to Arbuthnot are received as evidence, without a shadow of proof. For the author, from whom this evidence is quoted, also adds, "that even the "comparison of hand writings, though it may be usefully "employed in the detection of forgery, is no evidence to "authenticate any writing whatever, as evidence, in a "criminal prosecution."

"An attestation of a witness must be only to what he "actually knows, from his own observation of the facts "in issue. He is not to be examined as to what he has "heard, or been informed of by others, for his testimony "being, in that case, a reference to the information of a- "nother, who is not upon oath, is no evidence at all." Yet, in the case of Arbuthnot, the hearsay evidence of Indians, who, as the report of the select committee justly remarks, would not have been competent witnesses, if present, is received by the court.

"*Facts* are the subjects of evidence, not *opinions*." It is, therefore, "to the truth of facts that evidence is regularly brought, and, to form opinions of these, is the province not of the witness, but of the judge or juror who "is to decide them. No party, therefore, in a trial, is entitled to obtrude the opinions of a witness upon the "court, or to call upon a witness to answer questions of opinion;" yet a witness, Hambly, a Spanish renegado, the personal and open enemy of the prisoner, is expressly and repeatedly invited by the court, on the trial of Arbuthnot, to give his opinion of the prisoner's guilt or innocence.

But, admitting the prisoners to have been legally tried

by a court of competent jurisdiction, and legally condemned, the execution of Ambrister was in defiance of the sentence of the court, and a mockery of its authority. An hon. colleague of mine (Gen. Smyth) has contended that there were two sentences in the latter case, & justifies the approval of the first, which condemned the prisoner to death, because the last was illegal. "The judgment of 'a court martial is always under its own control," says 'Macomb, "until it is communicated to the officer by 'whom it is convened." In this case, the first judgment was re-considered. The re-consideration restored the court and the prisoner to the same situation in which they had stood before any sentence whatever was pronounced; and the final judgment was, therefore, the only judgment of the court. This judgment sentenced the prisoner to be whipped and to hard labor.

General Jackson "disapproved the re-consideration— 'approved the finding and first sentence of the court, and 'ordered Ambrister to be shot." Had he authority to do so? "With the appointment or constitution of the 'court martial," says the high authority I have already quoted, "the power of the officer over the prisoner, 'ceases until that court shall have pronounced judgment. 'The President of the United States, or General, can no 'more interfere with the procedure at courts martial, in 'the execution of their duty, than they can with any of 'the fixed courts of justice; nor even after the court 'martial has pronounced its sentence, is it in the power 'of the President, General, or other officer ordering the 'court, to add to or alter that sentence in any one parti-'lar, unless a recommendation to that effect shall be 'therein contained. The President or commander in 'chief, in virtue of his prerogative of mercy, may entire-'ly remit the punishment which the court has awarded, 'or, by disapproving the sentence, he may order the 'court to sit again, and to review their proceedings and 'judgment; but he can no more decree any particular 'alteration of their sentence, than he can alter the judg-'ment of a civil court, or the verdict of a jury." Arbuthnot and Ambrister were, therefore, tried by a court of incompetent jurisdiction—the former was condemned upon illegal evidence, and the latter executed by order of the commanding general, in defiance of the judgment of a court of his own appointment; all of whose proceedings he approved, except their single act of mercy, the reconsideration of their sentence against Ambrister.

The general order of the 29th of April, commanding the immediate execution of Arbuthnot and Ambrister, uncondemned even to this day, nay, more than tacitly appro-

ved, is, Mr. Chairman, a stain on the records of the judicial proceedings of this nation, to the insecurity of the honor and life of every officer and soldier of the armies of the United States, and of every citizen of America, who may be legally, or otherwise, subjected to the judgment of a court martial; a proceeding which imperiously calls for the interposition of the authority of Congress, in order that, instead of being converted into a precedent for future imitation, it may be shunned as an object of abhorrence. Sir, it is no little cause of alarm to behold the highest military court of criminal justice, which should be the shield of innocence, converted into a rod of oppression. While I listened with equal attention and delight to the eloquent and able argument of my honorable friend from New York, I thought that even he underrated the security which a military court is designed to afford to an innocent prisoner. I thought he supposed that a military judge was not sworn to discharge the duties of his office with fidelity and impartiality. [Mr. *Storrs* arose to explain. He had remarked, he said, that the *charges* were not sworn to, on which a prisoner was arrested.] I misunderstood my honorable friend, said Mr, Mercer; but even here, the charge must be sanctioned by the honor of an officer. A general court martial derives its appointment from the sound discretion of the highest military authority in an army: its sentence is inoperative until it receives his approbation; and any officer who should seek, by the instrumentality of such a court, to gratify secret resentment or malignity, would render himself odious to his whole corps.

The ingenuity of my hon. colleague (Gen. Smyth) will in vain attempt to discover an analogy between this trial and any event in the judicial history of this nation. The board of officers who reported Major Andre to be a spy, were not constituted a court martial, but if they had been, their sentence was not disregarded. The gentleman will turn in vain to the annals of the revolution for a precedent to extenuate the enormity of this whole proceeding. We have been asked, "whence this sympathy for "two British prisoners?" Sir, my sympathy is not with them, but with our violated laws. The people have seated us by the fountain of justice, and charged us to preserve its purity from contamination. Extraordinary and alarming as are the doctrines of martial law, maintained in this debate, there is yet some consolation in perceiving that our opponents have deemed it necessary to take a double ground; & lest the judgment of the court martial should not sustain the execution of the prisoners, they have resorted to the broad right of retaliation—

which brings me to the last proposition that I undertook to maintain—that the accustomed clemency of this nation, manifested in all former wars, has been disregarded in the late Seminole campaign, by the execution in cold blood, of unresisting captives subjected to our arms by the chance of war. Without enquiring into the manner in which the two Suwanee chiefs were decoyed into our grasp by the use of the British flag, or Arbuthnot was dragged from beneath the protection of the neutral flag of Spain; acts which, coupled with the succeeding tragedy, imbue its closing scene with deeper horror, I utterly protest against the application, which has been made of the exploded usages of war, to justify these barbarities. Nor will I distinguish between the treatment of our Indian and white prisoners, a distinction which, until this debate, was never heard within the councils, nor known until the late Seminole war, in the practice of this nation, or of any of the numerous states of which it is composed. The doctrine that Ambristier was not entitled to be regarded as a prisoner of war, because he had no commission from his own sovereign, would have equally applied, as the select committee have remarked, to the most distinguished officers of our revolution; men to whom the venerable Congress of that day voted statues and monuments, and whom our enemy, in all the pride of his power, dared not but respect. The other doctrine of my honorable colleague, (Gen. Smyth) that Ambrister had no commission from the Indian nation, to which he united his arms, is disproved by an authority, which he himself will admit; by the charge to which the prisoner plead guilty, and upon which, he was condemned to be shot by his prosecutor; the charge of *leading* and *commanding* the Lower Creek Indians, in carrying on *a war* against the United States—unless, indeed, it be contended, that he commanded, and led his forces *without their consent*. The crime of aiding, abetting, and comforting them, on which the remaining charge was ounded, is evidently merged in the heavier accusation to which he plead guilty, and which he sought at least to justify. And if, sir, the war was *defensive*, on the part of those unhappy Indians, a justification more complete in all its parts, could not be well imagined. The benefit of that justification would alike extend to Arbuthnot, a mere trader in the usual subjects of Indian commerce, since they have laid down the bow and arrow and resorted for subsistence, as well as security, to the musket and rifle, if he had not in fact discountenanced their resistance of a force that he saw must overwhelm them.

Who, sir, were the other captives condemned to death?

It has been said of one of the Suwaney chiefs, that he was the author of the massacre of Scott's detachment, destroyed, as I have proved, in that Indian territory which our army was not only preparing to invade, but had, in fact, invaded; and the participation of this chief in the bloody massacre which closed this scene, is unsustained by any proof whatever.

As to his unfortunate comrade, the Indian Prophet, what are his imputed crimes? That he was, himself, the victim of superstition; that he deluded his wretched followers. Such was the guilt, sir, of all the augurs and soothsayers of the ancient republics, sometimes Prætors, Consuls, and Dictators, not to Rome alone, but to a conquered world. A guilt, in which lies still involved three-fourths of the human race; many of whom yet groan, in cities, in palaces, and temples, beneath a superstition, compared with which, the religion of the wandering inhabitants of our western wilds is simple, peaceful, and consolatory. Or did his guilt consist, as has been intimated, in returning home with a foreign commission, after having crossed the Atlantic in quest of aid, to sustain the sinking fortune of his tribe? Has it, then, become a crime, in our day, to love our country; to plead her wrongs; to maintain her rights; or to die in her defence? Sir, had not the God I worship, a God of mercy as well as truth, taught me to forgive mine enemies, did he, as the Great Spirit whom the Seminole adores, allow me to indulge revenge; were I an Indian, I would swear eternal hatred to your race. What crimes have they committed against us, that we have not, with superior skill, practised upon them? Whither are they gone? How many of them have been sent to untimely graves! How many driven from their lawful possessions! Their tribes and their very names are almost extinct. My honorable colleague, (Mr. Barbour), who differs from us on this question—my honorable friend I will call him, for he inspired that sentiment, while he eloquently described the wrongs and sufferings of this unhappy race—will not condemn in a poor Seminole Indian that love of country, of which, if it be indeed a crime, no man is more guilty than himself. But it seems he was an Indian The Suwaney chief, his comrade, was so too. Arbuthnot and Ambrister, who inspired their counsels and led them to combat, are to be regarded as themselves, and, under the law of retaliation, they were all liable to suffer death, at the pleasure of General Jackson. And thus, Mr. Chairman, the clemency which has been observed, for two centuries, in all our conflicts with the aborigines of America, is at length discov-

ered to have been an impolitic abandonment of the rights which we derive from the laws and usages of war. Nay, sir, the victories of all our former commanders, in all other Indian wars, are cast into the shade, in order to magnify the effect of this new policy. In the hard-fought battle of Point Pleasant, in which, I have heard, that 300 Virginians fell, my colleague, (General Smyth) tells us, that only 18 Indian warriors were found dead on the field. Before the impetuous charge of the gallant Wayne, but 20 fell. At Tippacanoe, but 30. On the banks of the Tallaposoa, General Jackson left 800 Indians dead. Sir, it is consolatory to humanity to look beyond these fields of slaughter, to the peace which followed them, the only object of a just war From the battle of Point Pleasant to the present day, Indian hostilities have ceased in Virginia. The victories of Wayne led to the treaty of Greenville, & was followed by a peace of 18 years. The treaties of Hopewell, of N. York, and of Colerain, preceded by no battles, were succeeded by a peace, which, with the Creeks and Seminoles, it required, after the lapse of nineteen years, another British war to disturb; and which, with the Choctaw and Chickasaw Indians, endures to this moment. While the splendid victory of Talapoosa, and the treaty of Fort Jackson, have not yet, it is said, secured to us peace, although aided by our new code of retaliation, and its practical commentary, the execution, in cold blood, of four Indian captives.

Mr. chairman, it has been justly remarked, that the only lawful end of retaliation is lost on an Indian foe. Death has no terrors for a North American savage. Hunting and war are his delight. He hates labor. You may punish him by requiring him to construct another wig-wam, by laying waste his corn-fields, or destroying the fruits of his harvest. So far our retaliation has hitherto gone. And the peace which it has purchased, has evinced its efficacy. The Indian is as generous as he is brave. In our past intercourse we have sometimes conciliated his friendship by presents; and, by kindness, softened his ferocity. Why not persevere? With him revenge is lawful. By departing from the maxims observed in all former wars, we shall rival our savage foe in cruelty, without his apology to plead in its extenuation.

I admit the power of a military commander to put his prisoners to death, but I deny his right. No man has a right, derived from God or nature, to practice cruelty or injustice; and all needless severity is both unjust and cruel.

The law of nations sanctions no such pretensions. Two of our Indian treaties furnish a more correct exposition

of this law, than our adversaries have done. "It is un-
'derstood, (said the old congress and their Indian allies)
'that the punishment of the innocent, under the idea of
'retaliation, is unjust." "A nation, (says Vattel) may
'punish another, which has done her an injury, if the
'latter refuses to give her a just satisfaction; but she has
'not a right to extend the penalty beyond what her *safe-*
'*ty* requires. Retaliation, which is *unjust* between private
'persons, would be *much more so, between nations;* because
'it would, in the latter case, be difficult to make the pu-
'nishment fall on those who had done the injury,"

Wherever this humane writer seems to contradict this doctrine, as when he sanctions the departure from the usages of civilized warfare, to retaliate on nations who disregard them, it is to bring those nations back to reason and conscience. If this be impossible, the retaliation is unjustifiable.

Would you make slaves of Algerine captives because the Turks enslave their christian prisoners? Europe has never thus retaliated on the states of Barbary. How speedily would the practice of this doctrine replunge the world in barbarism. In refusing to wage war for revenge, and blending martial courtesy with valor, a nation advances her true glory That enemy is most to be dreaded, who conquers by his clemency as well as his sword. "Who, though the lion in combat, the battle
'once ended, has the heart of a lamb." Such has ever been the character of an American soldier, and such, I trust, Mr. chairman, will continue to be the boast of our arms.

How gratifying will it hereafter be to the feelings of this nation, in looking back on the course of this debate, when all its irritation shall have subsided, to perceive that the most laborious research into the past history of our country, from the first period at which our fathers landed on this continent, down to the late Seminole war, has not been able to furnish a solitary example of the execution of an Indian captive, in cold blood. Usage is the best expositor of national law, and the usage of two centuries excludes this new law of retaliation from the humane code of America.

It has been urged by one of my honorable colleagues, (Gen. Smyth) to whose argument I have often had occasion to advert, in the course of this debate, that the glory of a nation consists of the fame of its great men. I had thought it more comprehensive. That it embraced all the blessings, moral and physical, with which the munificence of heaven has crowned the lot of any people. The extent of their territory, the salubrity of their climate,

the fertility of their soil, the multitude and variety of its productions, the scenery of their country, its capacious bays, its noble rivers, its lofty mountains; their commerce, their arts of peace as well as of war, their manners, their customs, their institutions, their laws, their morality and piety, and the wide diffusion of their happiness. With us, sir, the security of all these blessings, that which stamps on them their durable value, is our excellent constitution of government. This is the cement of our union, the spring of our commerce, the shield of our security, the pledge of our peace, the guardian of our freedom. Whatever other sources of distinction we may possess, they will be found to be contained, at last, in our liberty. From this source, distinguished men have doubtless sprung, and will be multiplied in all future time. But let us not mistake the fruit for the tree; and, attracted by the lustre of the one, leave the other to perish by neglect.

In the progress of my argument, I perceive, Mr. chairman, that I have anticipated my last proposition, and have removed, I trust, the necessity of offering any further reasons in support of the resolutions on your table. Of those which are immediately practical, one will, I hope, furnish an additional sanction to the acknowledged law of nations, which forbids a belligerent to enter a neutral territory, without permission, except in fresh pursuit of a flying enemy; & the other, which requires the assent of the president of the United States to sanction the execution of a prisoner of war, on the supposition that he may be tried by a court martial, extends the security for human life very little farther than the present articles of war. Following the American army every where, they now require that no judgment of a court martial, in time of peace, inflicting capital punishment, shall be executed, until it has received the approbation of the President.